Supreme Court, U.S.
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No. _____

In The

# Supreme Court of the United States

October Term, 1995

JAMES E. SMITH,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I. Whether the District of Columbia Circuit violated this Court's ruling in *Broce v. United States* by affirming the denial of Petitioner's 28 U.S.C. § 2255 motion despite the fact that Petitioner's plea facially revealed that it violated the Double Jeopardy prohibition and petitioner's sentence was illegally imposed.

II. Whether the District of Columbia Circuit's affirmance of the denial of Petitioner's 28 U.S.C. § 2255 motion conflicts with rulings of this Court and other circuit courts because it allows for conviction and sentencing on a crime other than that which is charged in an information.

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## OPINIONS BELOW

The opinions and orders at issue in this Petition for certiorari are listed below. Copies of each document are being submitted in the Appendix accompanying this Petition.

1. Final Order and Memorandum Opinion Filed on March 1, 1994.

> This Order, issued by the Honorable June L. Green, United States District Judge for the District of Columbia, denied Petitioner's 28 U.S.C. § 2255 Motion.

*See* Appendix B.

2. *United States v. James E. Smith,* judgment, 94-3024 (April 4, 1996, D.C. Cir.).

> This was an unpublished judgment in Appeal No. 94-3024, issued on April 4, 1996 by a panel of the D.C. Circuit, which affirmed the District Court's denial of Petitioner's 28 U.S.C. § 2255 Motion.

*See* Appendix A.

## STATEMENT OF JURISDICTION

On April 4, 1996, a panel of the United States Court of Appeals for the District of Columbia Circuit affirmed the Final Order of the United States District Court for the District of Columbia which was issued on March 1, 1994, and which denied Petitioner's 28 U.S.C. § 2255 Motion. This Petition for a Writ of Certiorari is timely filed.

## STATEMENT OF THE CASE

This case is presently before the Court on Petition for Certiorari following the District of Columbia Circuit's affirmance of the District Court's denial of Petitioner James E. Smith's Motion to Vacate Sentence under 28 U.S.C. § 2255. With regards to his conviction and sentence on three counts, Petitioner's Motion alleged that the Court had illegally sentenced him to multiple terms of incarceration based on activity which constituted a single, continuing offense, rather than distinct and separate offenses. With regards to another count, petitioner's motion alleged that the Court had sentenced him to a term commensurate with a charge not alleged in the charging document.

Petitioner's convictions and sentences originated from an information filed in the United States District Court for the District of Columbia on March 7, 1988 which charged petitioner with the following five counts: conspiracy to distribute heroin in violation of 21 U.S.C. § 846 and § 841; three counts of tax evasion in violation of 26 U.S.C. § 7201 (counts two through four); and one count of criminal forfeiture, pursuant to 21 U.S.C § 853(a)(1). Though the information alleged that Petitioner distributed heroin, the government did not specify any particular amount of heroin that was allegedly distributed.

On March 16, 1988, petitioner pleaded guilty to all counts of the information and the trial court accepted the plea, the Honorable Barrington D. Parker presiding. Petitioner was sentenced on June 3, 1988. At the time of the sentencing, the Government presented a detailed Factual Proffer to the Court, setting out the allegations of criminal activity by the Petitioner. *See* Appendix C. Petitioner

also made statements to the Court regarding his actions. The trial court found that the alleged conspiracy distributed an amount of heroin in excess of 100 grams, and applied the provision for sentence enhancement pursuant to 21 U.S.C. § 841(b)(1)(A), which at the time of sentencing required a twenty-year sentence for amounts of heroin exceeding 100 grams. Consequently, petitioner was sentenced to twenty (20) years of imprisonment on the conspiracy count. Had the court not so enhanced the sentence, petitioner would have faced a maximum of fifteen (15) years. The court also imposed a five-year sentence of imprisonment for tax evasion under count two, a five-year sentence of imprisonment for tax evasion under count three, and a five-year sentence of imprisonment for tax evasion under count four. The court ordered that all sentences were to run consecutively.

On March 3, 1993, petitioner moved the trial court to correct his illegal sentence pursuant to Federal Rule of Criminal Procedure 35(a), or to vacate his conviction pursuant to 28 U.S.C. § 2255. His motion raised two issues:

> 1. Whether consecutive sentences imposed for income tax evasion constituted impermissible multiple punishments for a single offense, since the tax evasion charges were based upon a continuous course of conduct.
>
> 2. Whether the trial court incorrectly imposed an enhanced sentence under 21 U.S.C. 841(b)(1)(A), since the information did not allege an offense punishable under that provision.

On March 1, 1994, the trial court denied this motion, the Honorable June L. Green presiding. *See*, Appendix B.[1] A timely notice of appeal was filed.

A panel of the United States Court of Appeals for the District of Columbia Circuit affirmed the district court's denial of both of Petitioner's motions in a per curiam opinion on April 4, 1996. *See* Appendix A. The mandate was issued, and judgment was accordingly entered on May 29, 1996.

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[1] On August 17, 1994, petitioner filed a second motion to vacate sentence pursuant to 28 U.S.C. § 2255. Petitioner also requested, and was granted, a stay of his appeal of the denial of his first § 2255 motion. A motion for leave to supplement the August 17th motion was filed on August 29, 1994, adding three new issues to petitioner's previously filed § 2255 motion. None of the issues raised in petitioner's second § 2255 motion is raised in the instant Petition. The district court denied all of the issues in petitioner's second § 2255 motion on June 20, 1995. A timely notice of appeal was filed upon the Court's denial of the second motion. The District of Columbia Circuit then consolidated the two appeals.

## REASONS FOR GRANTING THE WRIT

### I. THE DISTRICT OF COLUMBIA CIRCUIT VIOLATED THIS COURT'S RULING IN *BROCE v. UNITED STATES* BY AFFIRMING THE DENIAL OF PETITIONER'S § 2255 MOTION DESPITE THE FACT THAT PETITIONER'S PLEA WAS FACIALLY INVALID AND PETITIONER'S SENTENCE WAS ILLEGALLY IMPOSED.

#### A. Petitioner's challenge of his facially invalid plea is not precluded by this Court's decision in *Broce v. United States*.

*Broce v. United States*, 488 U.S. 563, 102 L.Ed.2d 927, 109 S.Ct. 757 (1989), stands for the general proposition that a guilty plea constitutes a waiver of all claimed defects in a prosecution except challenges to the jurisdiction of the court. Specifically, in *Broce*, this Court held that the defendant corporation's guilty plea waived any subsequent double jeopardy claim. However, the *Broce* Court left open an exception to the general rule – an exception never further developed by this Court, but worthy of exploration in this case:

> There are exceptions where on the face of the record the court had no power to enter the conviction or impose the sentence. *Broce*, 488 U.S. at 569.

The instant case involves the Court of Appeals for the District of Columbia Circuit misapplying *Broce* to preclude, rather than permit, petitioner's double jeopardy claim.

The Court of Appeals erred when it found, pursuant to *Broce*, that petitioner had waived his Fifth Amendment

right to be protected from Double Jeopardy by having taken a plea. Petitioner's conviction and sentence on three separate counts which should properly have been joined violated Petitioner's Fifth Amendment's right to be protected from Double Jeopardy. This violation is facially apparent from the information and the government's factual proffer at the time of the plea. Nevertheless, the District of Columbia Circuit held that Petitioner's claim was precluded by *Broce*. This holding conflicts with this Court's express exception carved out by the *Broce* decision: that a guilty plea does not automatically extinguish a double jeopardy claim which is apparent on the face of the available information and does not require the Court to create an evidentiary record. *Broce*, 488 U.S. at 569, 575.

This Court clearly held in *Broce* that it was not changing the general exception to the rule barring collateral attack on a guilty plea. *Broce*, 488 U.S. at 574. This exception applies to a plea of guilty to a charge which the State may not constitutionally prosecute. *Menna v. New York*, 423 U.S. 61, 63, n.2 (1975)(per curiam)(guilty plea does not waive claim that, judged on its face, the court lacks power to proceed). This Court has placed great weight in the conclusive effect of guilty pleas on *factual* guilt. *Tollett v. Henderson*, 411 U.S. 258 (1973). However, that reasoning does not apply with regards to claims of Constitutional violation where "the State may not convict [a] petitioner no matter how validly his factual guilt is established." *Menna*, 423 U.S. at 63.

A prosecution in violation of Double Jeopardy, which is apparent on the face of the information, is just such a conviction. *Blackledge v. Perry*, 417 U.S. 21 (1974). Thus, in

a case such as Petitioner's, a challenge of a plea to a facially duplicative information is not precluded by *Broce*. In holding that Petitioner's claim was so precluded, the District of Columbia Circuit violated the prior holdings of this Court.

### B. Petitioner's plea to charges in an information which contained facially duplicative counts violates his Fifth Amendment protection against Double Jeopardy.

The Fifth Amendment protects against multiple punishments for a single offense. U.S. CONST. amend. V.; *United States v. Ursery*, 518 U.S. ___, 1996 WL 340815, 4 (U.S.)(1996); *Albernaz v. United States*, 450 U.S. 333, 343 n. 16 (1981). The government violates this protection when it impermissibly divides a single criminal action into separate counts of an information or indictment, and then convicts and punishes for conviction on each of the counts. *United States v. Harris*, 959 F.2d 246, 250 (D.C.Cir. 1992). Where consecutive sentences are imposed in a single criminal trial, the role of the constitutional guarantee of the double jeopardy clause "is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense." *Brown v. Ohio*, 432 U.S. 161, 165 (1977). In the instant case, the plea arrangement facially violated these protections. By affirming the lower Court's conviction and sentence on three separate counts of tax evasion in counts two through four of the information, the Court of Appeals upheld the government's decision to divide the continuing course of conduct of Petitioner into three separate counts. The result, upon his plea, was conviction and

sentence on three different counts – leading to a total sentence on those portions of the indictment of fifteen years, whereas Petitioner should have received a maximum penalty of five years for his actions which constituted criminal tax evasion.

Conduct constituting a single course of criminal activity may properly be joined as one count in an indictment or information. *United States v. Shorter*, 809 F.2d 54 (D.C.Cir. 1987). In *Shorter*, the defendant was charged with twelve separate years of tax evasion under a single count of an indictment. Upon defendant's claim that the one count should have actually been prosecuted as twelve separate counts, the Court held that the crime of tax evasion in a case such as that was actually a *single* criminal offense constituting a continuous criminal motivation and merely covering a span of years. *Shorter*, 809 F.2d at 57. The nature of the conduct charged was central to the determination of whether the acts constituted a continuing offense. *Shorter*, 809 F.2d at 56. Thus, activities demonstrating a "cash lifestyle" were indications that the offense was single and continuing: appellant had conducted all of his personal and professional business in cash; maintained no bank accounts or office records; never filed estimated tax returns. The arbitrary calendar divisions did not affect the continuous nature of the defendant's behavior, and therefore the charge was properly brought under one count. *United States v. Shorter*, 608 F.Supp. 871, 878, n. 28 (D.C.D.C. 1985). Accordingly, the Court of Appeals held that in a prosecution for tax evasion involving long-term criminal activity, it was proper for the government to indict the entire activity under one count. *Shorter*, 809 F.2d at 58.

In the instant case, the government's Factual Proffer at the time of the plea, combined with the defendant's statements to the Court, clearly details a continuous and long-term pattern of activity. Appendix C. The Proffer sets out in detail the criminal activity of petitioner, starting in or around 1983 and running through the early part of 1988. There is no significance assigned to any specific year of criminal activity, save for a chart on page 17 of the Proffer which attempts to break down Petitioner's income through estimates from the government's evidence. The Factual Proffer contains no evidence that Petitioner's actions were affected by the tax year, or that the dates of the conduct had any effect on the investigations by the government. Rather, the Factual Proffer, which the trial court received and reviewed in approving the plea offer and sentencing Petitioner, clearly establishes that Petitioner's actions were a continuous and long-term pattern, consistent with the type of "cash lifestyle" that the *Shorter* Court found to merit the joinder of charges under one count. For example, the Proffer details purchases of automobiles and real property through "straw purchasers" and purchases of jewelry "which is easily secreted and difficult to trace." Appendix C, 19. Thus, it is apparent that the government should have, consistent with their own stated policy, and the Court of Appeals' analysis in *Shorter*, charged Mr. Smith with one count of tax evasion as a continuing offense. This charging error is readily apparent from the face of the information and review of the government's Factual Proffer which was submitted to the Court in support of the plea.

The information supported by the Government's own allegations in the factual proffer establishes that Petitioner was charged and sentenced in three separate counts for a continuous activity. Petitioner's convictions on Counts Three and Four should be vacated and his sentence reduced accordingly.

## II. THE DISTRICT OF COLUMBIA CIRCUIT'S AFFIRMANCE OF THE DENIAL OF PETITIONER'S § 2255 MOTION CONFLICTS WITH RULINGS OF THIS COURT AND OTHER CIRCUIT COURTS BECAUSE IT ALLOWS FOR CONVICTION AND SENTENCING ON A CRIME OTHER THAN THAT WHICH IS CHARGED IN AN INFORMATION.

The District of Columbia Circuit erred when it affirmed the District Court's denial of Petitioner's 28 U.S.C. § 2255 Motion despite the fact that petitioner was convicted and sentenced for a crime different than that with which he was charged in the information. The Court of Appeals, in its Memorandum, Appendix A, states that "[Petitioner's] claim is not supported by circuit precedent. *See United States v. Patrick*, 959 F.2d 991, 996 n.5 (D.C. Cir. 1992)." In *United States v. Patrick*, the District of Columbia Circuit held that the quantity of drugs possessed is not a constituent element of the offense of possession with intent to distribute under 21 U.S.C. § 841(a). *Patrick*, 959 F.2d at 996, n.5. Accordingly, the District of Columbia Circuit held that in the instant case, the trial court could sentence Petitioner to an enhanced period of incarceration without provision for such an enhancement in the information. This conclusion fails to

address the true fault with the District Court's decision: namely that Petitioner was convicted and sentenced for a crime with which he was not charged in the information.

Petitioner was *not* sentenced under the Federal Sentencing Guidelines. Thus, cases such as *Patrick*, which deal with permitted enhancements under the Guidelines are not on point. Rather, the inquiry must focus on the charge as presented in the information versus the sentence as declared by the lower Court. Petitioner was charged in Count One of the information with distribution of unspecified amounts of heroin under Title 21 United States Code, Section 841(a). There is no mention in the information of the weight of the drugs. Under § 841(b)(1)(A), an offense involving one hundred grams or more of heroin is punishable by up to twenty years imprisonment, a fine of up to $250,000.00 or both. Under § 841(b)(1)(B), an offense other than described in subparagraphs (A) and (C) is punishable by up to fifteen years imprisonment, a fine of not more than $125,000.00 or both. In the instant case, the information charged a conspiracy to distribute and possession with intent to distribute "quantities of heroin" in violation of 21 U.S.C. § 846. Despite the absence of any allegation of quantity, the District Court imposed a twenty year sentence and $150,000.00 fine under § 841(b)(1)(A). Clearly, the information could not, as a matter of law, support such an enhanced penalty. Therefore, the sentence is illegal, and the District of Columbia Circuit erred in upholding it based on *Patrick*.

By allowing Petitioner's conviction to stand, the District of Columbia Circuit contradicted holdings reached

by other circuits. Different circuits have held that allegation of the quantity of drugs is a critical element under 21 U.S.C. § 841 and that absent specific allegation of weight, the enhancement provisions of § 841(b)(1)(A) are inoperative. *See, United States v. Crockett*, 812 F.2d 626, 629 (10th Cir. 1987)(enhanced penalty on guilty plea to marijuana charge illegal where no quantity alleged); *United States v. Alvarez*, 735 F.2d 461, 467-68 (11th Cir., 1984)(striking enhanced sentence for over 1000 pounds of marijuana due to lack of allegation of quantity in the indictment.)

The reasoning behind these decisions is grounded in the concept that in order for a plea to be "knowing and voluntary", *Boykin v. Alabama*, 395 U.S. 238 (1969), a defendant must receive proper and complete notice of the charges which he faces. *Brady v. United States*, 397 U.S. 742 (1970). In the instant case, Petitioner was charged in Count One of the information with distribution of unspecified amounts of heroin under Title 21 United States Code, Section 841(a). He was sentenced under the enhancement provisions of § 841(b). It is clear from the record that Petitioner was sentenced for a crime which the information did not charge. Such a conviction and sentence violates Petitioner's right to Due Process.

In following the *Patrick* decision and thus affirming the district court's denial of Petitioner's motion under 28 U.S.C. § 2255, the District of Columbia Circuit contradicted the findings of other Federal Circuits regarding the ability of the District Court to impose a sentence which corresponds to a charge which the information does not allege. More importantly, the District of Columbia Circuit ignored this Court's holdings with regards to required notice and Due Process considerations. For these reasons,

this Court should grant certiorari and resolve this conflict.

## CONCLUSION

For the reasons stated herein, Petitioner respectfully requests that this Court grant certiorari and vacate the ruling of the District of Columbia Circuit with orders for the district court to resentence petitioner accordingly.

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**UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**No. 94-3024** **September Term, 1995**

**United States of America,**

**Appellee**

**v.**

**James E. Smith,**

**Appellant**

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**Consolidated with 95-3091**

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**Appeals from the United States District Court**
**for the District of Columbia**
**(No. 88cr00073)**
**(No. 88cr00073-01)**

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**Before:** WILLIAMS, RANDOLPH and TATEL, *Circuit Judges.*

## JUDGMENT

(Filed Apr. 04, 1996)

This appeal was heard on the record from the United States District Court for the District of Columbia and on the briefs and arguments of counsel. The court has accorded the arguments full consideration and has determined that the issues presented occasion no need for a published opinion. *See* D.C. Cir. Rule 36(b).

Smith's double jeopardy claim fails because any such defense would require evidence outside the record and, thus, was waived by his guilty plea. *See United States v. Broce*, 488 U.S. 563, 574-78 (1989). Smith's argument that the district court erred when it sentenced him under an enhancement provision based on the quantity of drugs he distributed fails as well. His assertion that the district court failed to inform him at his plea hearing of his exposure to a 20-year sentence under the enhancement provision is simply incorrect as a factual matter. *See* Defendant's Appendix 67 (transcript of plea hearing). His claim that the sentence enhancement was error because the information did not contain any specification of drug quantity is not supported by circuit precedent. *See United States v. Patrick*, 959 F.2d 991, 996 n.5 (D.C. Cir. 1992). Finally, Smith's argument that his counsel was ineffective in failing to appeal his sentence fails because Smith has raised no argument that would have succeeded on direct appeal and has not contested application of the direct appeal standard to the arguments he raised.

For these reasons, it is ORDERED that the judgments from which this appeal was taken be affirmed.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 41(a)(1).

**FOR THE COURT:**
Mark J. Langer, Clerk

BY: /s/ Eva Brown
Deputy Clerk

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | |
|---|---|
| **UNITED STATES OF AMERICA,** Plaintiff, v. **JAMES E. SMITH,** Defendant. | Criminal. No. 88-0073 (JLG) |

ORDER

(Filed Mar. 1, 1994)

The Court has considered Defendant's Motion to Correct Illegal Sentences or Alternatively to Vacate Judgments pursuant to former Fed. R. Crim. P. 35(a) and 28 U.S.C. §2255, the Government's Opposition, Defendant's reply thereto, and the oral arguments presented at the Hearing on the motion. For the reasons set forth in the accompanying Memorandum, it is by the Court this 28th day of February, 1994 hereby

**ORDERED** that Defendant's motion is denied.

/s/ June L. Green
June L. Green
U.S. District Judge

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | |
|---|---|
| **UNITED STATES OF AMERICA,** Plaintiff, v. **JAMES E. SMITH,** Defendant. | Criminal No. 88-0073 (JLG) |

**MEMORANDUM**

(Filed Mar. 1, 1994)

On March 3, 1993 the Defendant, James E. Smith, filed a Motion to Correct Illegal Sentences or Alternatively to Vacate Judgments [hereinafter "Def. Mot."], pursuant to former Fed. R. Crim. P. 35(a) and 28 U.S.C. § 2255 (1988). With this motion, the Defendant filed excerpted copies of the Information of March 3, 1988, the Government's Factual Proffer [hereinafter "Proffer"] of March 3, 1988, and the transcript from the March 16, 1988 plea hearing [hereinafter "Trans."].

Mr. Smith asserts that two circumstances entitle him to relief under 28 U.S.C. § 2255 (1988): *first*, designation of consecutive sentences under 26 U.S.C. § 7201 (1988) violated the Constitution's Fifth Amendment Double Jeopardy and Due Process clauses, and *second*, his sentence for violation of 21 U.S.C. §§ 841(a) (1982), *amended by* 21 U.S.C. 841(b) (Supp.II 1984), 846 (1988), was excessive because the Government failed to allege that the offense

charged in the Information involved 100 grams of heroin. Def. Mot. at 1-3. The Court will address each assertion in turn.

**FACTS**

On March 7, 1988 the United States filed an Information charging the Defendant with conspiracy to distribute and to possess with intent to distribute heroin under 21 U.S.C. § 841 (1982), *amended by* 21 U.S.C. § 841(b) (Supp.II 1984)[1] and 21 U.S.C. § 846 (1988) (Count One); income tax evasion in 1984, 1985, and 1986 under 26 U.S.C. § 7201 (1988) (Counts Two, Three and Four).[2] In conjunction with the Information, the Government filed a detailed factual proffer.

The Government did not specify the amount of heroin involved in the conspiracy offense (Count One) in the Information. The Government alleged in its factual proffer that the Defendant sold quantities of heroin in excess of 100 grams and also alleged that the defendant secreted funds, bought properties through straw purchasers and nominees, and did not pay federal income taxes in 1984, 1985, and 1986. Proffer at 17.

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[1] The 1986 Amendment to this statute went into effect on Nov. 1, 1987 as part of the Federal Sentencing Guidelines. Pursuant to a plea agreement, Defendant was sentenced under the pre-Guidelines version of the statute, 21 U.S.C. § 841 (1982), *amended by* 21 U.S.C. § 841(b) (Supp.II 1984). This statute will be referred to as 21 U.S.C. § 841 (1984).

[2] The fifth count involved criminal forfeiture.

In a plea agreement of February 6, 1988, Defendant agreed to waive indictment and enter a guilty plea to the five-part Information. Presentence Report [hereinafter "Pres. Rept."] at 5. Defendant stated in his March 16, 1988 plea hearing that his narcotics conspiracy continued to operate subsequent to November 1, 1987, the date the Federal Sentencing Guidelines and the revised version of 21 U.S.C. § 841 (1988) went into effect. Trans. at 34, 41. However, the plea agreement stipulated that Defendant would be sentenced under pre-Guidelines law. Pres. Rept. at 5.

On June 3, 1988, the trial court sentenced the Defendant to 20 years imprisonment and a $150,000 fine for Count One, and five years imprisonment on each of the three tax evasion Counts, for a total of 35 years. Upon Defendant's Motion, this Court reduced the Defendant's sentence on Count One from 20 to 15 years in a July 30, 1992 Order.

**DISCUSSION**

To prevail on a collateral challenge to a sentence under 28 U.S.C. § 2255 (1988), a defendant must surmount a hurdle considerably higher than on direct appeal. *United States v. Pollard*, 959 F.2d 1011, 1020 (D.C.Cir. 1992) 113 S.Ct. 322 (1992). Relief will issue only if the Court determines that the challenged sentence resulted from "a fundamental defect which inherently results in a complete miscarriage of justice." *Id.* (*quoting Hill v. United States*, 368 U.S. 424, 428 (1962)).

## I. Defendant's Challenge to his Sentence on Conspiracy Count

### A. Introduction

In Count One of the Information, the Government charged the Defendant with conspiracy to distribute and to possess heroin with intent to distribute under 21 U.S.C. § 841 (1984) and 21 U.S.C. § 846 (1988). Information at 1. He received an indeterminate sentence of 20 years and a fine of $150,000 pursuant to 21 U.S.C. § 841(b)(1)(A) (1984).

In his motion, the Defendant asserts that his sentence was inappropriate because the Government failed to allege in the Information that 100 grams of heroin were involved in the narcotics conspiracy offense. Def. Mot. at 15-16. The Defendant argues that the Government was required to allege the specific quantity of narcotics in its indictment under the pre-Guidelines version of 21 U.S.C. § 841 to procure an enhanced sentence pursuant to § 841 (b)(1)(A) (1984). *Id.* The Defendant relies upon *United States v. Crockett*, 812 F.2d 626 (10th Cir. 1987) and *United States v. Alvarez*, 735 F.2d 461 (11th Cir. 1984), for this proposition. The Defendant contends that absent such allegation, the maximum legal sentence was 15 years and a fine of $125,000 under 21 U.S.C. § 841(b)(1)(B) (1984).[3]

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[3] The government points out correctly that if the parties had not stipulated to apply the pre-1987 statute, the Defendant would have been subject to the 20 year indeterminate sentence he received regardless of whether the Government proffered evidence of quantity under 21 U.S.C. § 841(b)(1)(C) (1988). Government's Opposition to Defendant's Motion to Vacate, Set Aside, or Correct Sentence [hereinafter "Gov. Opp."] at 11-12.

Def. Mot. at 15-16. The Defendant does not illustrate that the lack of specificity in The Information constituted a fundamental defect resulting in a miscarriage of justice. Therefore, the Court denies the Defendant's motion with respect to Count One.

B. Discussion

In the absence of case law from this jurisdiction concerning specification of quantity under the pre-Guidelines statute, the Defendant relies upon *Alvarez* and *Crockett* to show that the Government's failure to identify a specific quantity of heroin in the Information is cause to reduce or vacate his sentence. In those cases, the defendants received enhanced sentences pursuant to 21 U.S.C. § 841(b) because the sentencing courts determined defendants' conspiracies involved a certain quantity of illegal drugs. *Crockett*, 812 F.2d at 628-29; *Alvarez*, 735 F.2d at 466-68. The courts did so absent the specific allegations of quantity in the indictment required under § 841(b) to validate the enhanced penalty. *Id.* On appeal, the courts found the indictments had not informed the defendants that they would be subject to the enhanced penalty, and therefore granted motions for resentencing under the lesser penalty provisions of 21 U.S.C. § 841. *Id.*

The Government contends that *Crockett* and *Alvarez* are distinguishable from the instant case because they involved direct appeals, while the instant case involves a collateral attack under 28 U.S.C. § 2255 (1988). Gov. Opp. at 15. The Government argues that although lack of specificity in the Information may have been grounds for relief on direct appeal, it does not rise to the level of a complete

miscarriage of justice in Mr. Smith's case. *Id.* (*citing United States v. Frady*, 456 U.S. 152, 166 (1982) (defendant must clear a significantly higher hurdle and prove a complete miscarriage of justice to obtain collateral relief)). Thus, the Government asserts that lack of specificity is not grounds to invalidate a sentence on collateral appeal. Gov. Opp. at 15.

The Government maintains that punishing the Defendant for possessing 100 grams of heroin cannot amount to a manifest injustice because the Defendant had actual notice of the quantity of heroin known to the Government. *Id.* at 15-16. The Government emphasizes that Defendant admitted to possession of over 100 grams of heroin on one occasion alone out of numerous admitted occasions. *Id.* at 16 (*quoting* Proffer at 16); Trans. at 23. In addition, the record indicates that Mr. Smith admitted in a plea agreement to having sold over 500 grams of heroin and therefore was fully aware that the Government had evidence which exceeded the 100 gram requirement of 21 U.S.C. § 841 (1984). Pres. Rept. at 2-3.

The Court recognizes the need to supply the Defendant with notice of the charges levied against him. This notice requirement is one of the fundamental concerns underlying indictment specificity criteria. *See Hamling v. United States*, 418 U.S. 87, 117-18 (1984); *United States v. McDonald*, 777 F.Supp. 43, 44 (D.D.C. 1991), *aff'd* 991. F.2d 866 (D.C.Cir. 1993). The Government argues that no manifest injustice occurred when the Information did not state a specific amount of heroin, because notice, the fundamental purpose underlying indictment specification, was supplied to the Defendant in this case. Thus, the defect that Defendant cites was only a technical deviation, and

did not rise to the level of a "fundamental defect" which would entitle the Defendant to relief under 28 U.S.C. § 2255 (1988). *See Pollard*, 959 F.2d at 1011, 1028 (government's breach of "facts and circumstances" limitation in plea agreement not considered a fundamental defect and § 2255 relief denied).

This Court also acknowledges that courts have been willing to uphold enhanced sentences on both direct and collateral appeal in the absence of specific allegations of quantity in indictments when Defendants had actual notice of chargeable quantity. *United States v. Olness*, 9 F.3d 716, 717 (8th Cir. 1993) (direct appeal); *United States v. Gibbs*, 813 F.2d 596, 599-601 (3d Cir. 1987), *cert. denied* 484 U.S. 822 (1987) (collateral relief denied). In *Olness* the government's statement of quantity of narcotics was included in the plea agreement, but was absent in the indictment. *Id.* The court held that defendant received sufficient notice of the possibility of sentencing under the enhanced penalty provision. *Id.* As in *Olness*, the Defendant in this case admitted to possession of over 100 grams of heroin in the plea agreement. Pres. Rept. at 2-3; Proffer at 17-23. Similarly, it follows that the Defendant had notice of quantity and of the applicability of the enhanced penalty provision regardless of the wording of the Information.

The Government demonstrated sufficiently that Mr. Smith had actual knowledge that the Government had and intended to present evidence that he possessed over 100 grams of heroin. As a result, Mr. Smith was aware at sentencing that he was liable to be sentenced under enhanced penalty provision of 21 U.S.C. § 841(b) (1) (A) (1984). The Government has convinced this Court that

this actual notice of chargeable quantity satisfied the fundamental purpose behind indictment specificity. Accordingly, this Court finds that no fundamental miscarriage of justice occurred when the trial court sentenced Mr. Smith to an enhanced penalty under 21 U.S.C. § 841(b) (1984), despite the lack of specification of quantity in the indictment.

C. Conclusion

Having considered the allegations set forth in Mr. Smith's claim of illegal sentencing, the Court holds that Mr. Smith was properly sentenced under 21 U.S.C. § 841 (1984). Notwithstanding the lack of specific reference to a quantity of heroin in the Information, the Defendant's 15-year prison sentence and $150,000 fine will remain undisturbed.

## II. Defendant's Challenge to Sentences Under 26 U.S.C. § 7201

A. Introduction

In Counts Two, Three and Four of the Information, the Government charged the Defendant with tax evasion under 26 U.S.C. § 7201 (1988) for 1984, 1985, and 1986 respectively. The Defendant pled guilty to each count and received three five-year sentences.

The Defendant asserts that the Court erred by sentencing him to separate sentences for Counts Two, Three, and Four and not sentencing him to one single count of income tax evasion. Def. Mot. at 3. He contends that the

Government did not present evidence sufficient to prove three consecutive violations of 26 U.S.C. § 7201 (1988), but rather presented proof of only one count of tax evasion based on a continuous course of conduct. Defendant's Memorandum of Points and Authorities Supporting Motion to Correct Illegal Sentence or Alternatively to Vacate Judgments [hereinafter "Def. Memo."] at 5, 6. He argues that § 7201 is ambiguous with respect to whether Congress intended multiple sentences to issue for multi-year tax evasion charged as a single continuing offense. Def. Reply at 2. As a result of such ambiguity, he claims the issuing of multiple sentences violated the Double Jeopardy Clause of the Constitution's Fifth Amendment, and therefore, the Court should apply the rule of lenity and reduce his prison sentence to one five-year sentence. *Id.* The Defendant fails to show that issuance of multiple sentences resulted in a fundamental miscarriage of Justice. Therefore, the three five-year sentences will remain undisturbed.

B. Discussion

Both the Defendant and the Government recognize that the D.C. Circuit has interpreted the language of 26 U.S.C. § 7201 (1988) as authorizing the government to charge violations taking place in consecutive years as either separate offenses or as a continuing course of conduct. *United States v. Shorter,* 608 F.Supp. 871, 876 (D.D.C. 1985), *aff'd* 809 F.2d 54 (D.C.Cir. 1987), *cert. denied,* 484 U.S. 817 (1987). In cases brought under 26 U.S.C.

§ 7201 (1988), the allowable unit of prosecution is controlled by the affirmative act or acts of evasion.[4] *United States v. Pollen*, 978 F.2d 78, 85-86 (3d. Cir. 1992), *cert. denied*, 124 L.Ed.2d 244 (1993). To adequately charge separate counts, the Government must support each count with evidence of an affirmative act of tax evasion which occurred in that specific year. *United States v. Conley*, 826 F.2d 551, 557 (7th Cir. 1987), *cited in*, *United States v. McGill*, 964 F.2d 222, 229-30 (3rd Cir. 1992), *cert. denied*, 113 S.Ct. 664 (1992) (pattern of cash withdrawals from bank held to be an affirmative act). The Government must present and prove three elements to establish an affirmative act of criminal tax evasion under 26 U.S.C. § 7201 (1988): 1) an attempt to evade or defeat a tax or payment thereof; 2) an additional tax due or owing; and 3) willfulness. *Sansone v. United States*, 380 U.S. 343 (1965).

Defendant contends that the Government has not met the evidentiary burden of proving separate affirmative acts for each year. Def. Mot. at 5-7; Def. Memo. at 3-6. He argues that the Government proved only one course of conduct. *Id.* The Defendant urges the Court to apply the reasoning of *United States v. Shorter*, 608 F.Supp. at 875-78. In that case, the D.C. Circuit held that the indictment of the defendant on one count of tax evasion for a continuous course of conduct was proper for offenses spanning multiple consecutive years. *Id.* Mr. Smith argues that the

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[4] Because the court concludes that § 7201 is not ambiguous with regard to the allowable unit of prosecution, the court will not address Defendants arguments with regard to the rule of lenity. Def. Memo. at 8-9.

proof the Government presented in his case was indistinguishable from that offered in *Shorter,* Def. Mot. at 5-7. Therefore, he argues, it must also be proper in this case to charge and sentence him to one offense based on a continuous course of conduct. *Id.*

The Government points out correctly that the Defendant's reliance on Shorter in this context is misplaced. Gov. Opp. at 7-10. The *Shorter* court ruled on the issue of duplicity: whether it was permissible for the Government to charge tax evasion spanning multiple years as one offense. *Shorter* 608 F.Supp at 875-78. The *Shorter* ruling did not relate to the issue of multiplicity: whether the government may charge continuing tax evasion in consecutive years as separate offenses, which is the disputed issue in the instant case.[5]

In his motion, Defendant dissects the evidence presented attempting to show that the Government did not link these affirmative acts of tax evasion, including a cash lifestyle and purchases of automobiles and real property through straw purchasers or nominees, to each specific year. Def. Memo. at 4-6. The Government maintains that it presented sufficient evidence linking an affirmative act with each specific tax year, and therefore asserts that the sentences ordered pursuant to each count were legal and appropriate. Gov. Opp. at 8-10.

The Government presents plentiful evidence of attempts to evade taxes in each of the three years. The

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[5] In *Shorter* the government was barred from charging in more than one count due to statute of limitations restrictions. *Shorter,* 608 F. Supp. at 873-74.

Government's Factual Proffer contains evidence of the "increase in defendant's net worth in **each tax year** [including] . . . records of (1) cash deposits by defendant in numerous bank accounts; and (2) payments to acquire numerous residential properties." (emphasis added) Proffer at 18. The Government also presented evidence that

> . . . expenditures in **each tax year** would include records and testimony reflecting (1) expenditures for the purchase of more than twenty-five automobiles during the period 1984 though 1986; (2) expenditures to insure and maintain defendant's numerous residential properties, two apartments and his fleet of automobiles; (3) expenditures to acquire numerous pieces of gold jewelry. . . . *Id.* at 18, 19. (emph. added)

In addition, the Government's proffer contains evidence of taxes due after the Defendant earned the following amounts and failed to file a federal income tax return in each of the three tax years: 1984 – $101,084.74 ($36,170.65 taxable), 1985 – $93,020.10 ($31,797.35 taxable), and 1986 – $411,392.11 ($147,256.06 taxable). *Id.* at 17.

Finally, the Government met the willfulness element of the test put forth in *Sansone v. United States* because the Factual Proffer contains evidence of the Defendant's prior conviction for evasion of federal income taxes as proof of Defendant's knowledge of the legal duty to pay taxes and willful evasion of that duty in each of the three years. Proffer at 20.

The record reflects that the Government presented sufficient evidence of affirmative willful acts of tax evasion in each of the 1984, 1985 and 1986 tax years in its Information and accompanying Factual Proffer to justify

charging consecutive counts of tax evasion. Thus, this Court finds that the Government's Information was not impermissibly multiplicitous and Mr. Smith's claim advanced under the Double Jeopardy Clause fails.

C. Conclusion

Having considered the allegations in Defendant's motion with respect to Counts Two, Three and Four of the Information, this Court holds that the Defendant was sentenced properly to three consecutive five-year sentences under 26 U.S.C. § 7201 (1988). Therefore, the Defendant's sentences under Counts Two, Three, and Four will remain undisturbed.

**CONCLUSION**

The Court has considered Mr. Smith's arguments in favor of correcting his sentence or vacating the judgments of the sentencing court pursuant to 28 U.S.C. § 2255 (1988). Based on the filings, oral argument, and the controlling legal authority, the court rejects Mr. Smith's claims of failure to specify the amount of narcotics in Count One and multiplicity with regard to Counts Two, Three and Four.[6] Therefore, the Defendant's motion shall

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[6] As the Court has rejected both of Defendant's claims on their merits, this Court will not address the Government's argument that the Defendant's claims are barred by his failure to directly appeal his sentences.

be denied. An appropriate Order accompanies this memorandum.

/s/ June L. Green
June L. Green
U.S. District Judge

Dated:
Feb. 28, 1994

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| UNITED STATES OF AMERICA | ) | Criminal No. 88-0073BDP |
| v. | ) | (Filed Mar. 16, 1988) |
| JAMES E. SMITH Defendant | ) | |

GOVERNMENT'S FACTUAL PROFFER

The United States of America, by its attorney, the United States Attorney for the District of Columbia, pursuant to Rule 11(f) of the Federal Rules of Criminal Procedure, submits the following proffer of its evidence in support of defendant James E. Smith's proffered plea of guilty to the Information filed on March 7, 1988. That Information charged the defendant with one count of conspiracy to distribute and possess with intent to distribute a controlled substance, that is, heroin, in violation of 21 U.S.C. § 846. The Information also charged defendant with three counts of tax evasion for calendar years 1984, 1985 and 1986 in violation of 26 U.S.C. § 7201. Finally, in the fifth count of the Information the United States charged the criminal forfeiture of defendant's right, title and interest in certain real and personal property pursuant to 21 U.S.C. § 853(a)(1). The following is a proffer of the Government's evidence as it relates to each Count of the Information.

Count One – Narcotics Conspiracy

1. If this case were to proceed to trial, the government's evidence would include post-arrest admissions made by SMITH regarding his involvement in a narcotics distribution conspiracy, as well as the testimony of witnesses, including an undercover Drug Enforcement Administration (DEA) agent, who have purchased heroin directly from SMITH. Following his arrest, and after being advised of his constitutional rights, SMITH admitted that he had sold substantial quantities of heroin to Undercover Agent (U/A) Veronica Baker, as well as to one DeVoyce Gaye Caviness, the cooperating witness who first introduced Agent Baker to SMITH. SMITH admitted that he had been selling heroin to DeVoyce Gaye Caviness, and her associates, since 1979.[1]

2. In addition to the testimony of Agent Baker and DeVoyce Gaye Caviness, the government would call several other witnesses at trial who would testify regarding purchases of heroin made from SMITH. Among those witnesses would be Everett Bagley.[2]

3. Everett Bagley will testify that he first met SMITH, referred to as SMITTY or HEAD, in the early part

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[1] DeVoyce Gaye Caviness, who is identified in Count One of the information as a co-conspirator of SMITH, would be called as a government witness if this case were to proceed to trial. Caviness has been recently admitted to the Witness Security Program. Caviness' expected testimony is described in paragraphs 8-28, *infra*.

[2] Everett Bagley. who was known to defendant JAMES E. SMITH as "Fair Play" or "Rabbit", assumed a new identity upon his admission to the Witness Security Program.

of 1960. Bagley purchased heroin from SMITH in the summer of 1983, when Bagley made trips from Richmond to Washington to buy SMITH's heroin. Bagley will testify that he purchased "spoon" quantities of heroin three to four times every week from the summer of 1983 until June of 1984, when Bagley was arrested. Bagley will testify that on one occasion in 1983 he obtained one half kilogram of heroin from SMITH for $75,000 and delivered it to a person in Richmond for SMITH. Bagley will further testify he had personal knowledge that one of SMITH's lieutenants was also receiving SMITH's heroin during this same time. Both SMITH and the lieutenant were identified by Bagley from an array of photographs.[3]

4. After Bailey began cooperating with DEA investigators, he made a series of controlled purchases of heroin from SMITH through the lieutenant. Government testimony would show that during these purchases, as explained below, the lieutenant maintained contact with SMITH. For example, on September 13, 1984, the lieutenant delivered Exhibit #1, 3.57 grams of brown powder, which was later analyzed as 40.8% heroin, to Bagley for $1600 in advanced official government funds. The lieutenant's delivery of Exhibit #1 to Bagley was conducted under the controlled supervision of members of the Organized Crime Drug Enforcement Task Force (OCDETF) in the following manner. Bagley first personally contacted

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[3] In a heroin distribution organization a "lieutenant" is a trusted individual who has supervisory authority over others in the organization and ready access to the head of the organization. The individual through whom Bagley purchased heroin from SMITH will be hereinafter referred to as "the lieutenant."

the lieutenant for the purpose of obtaining heroin. The meeting between the lieutenant and Bagley was surveilled. Surveillance units subsequently observed the lieutenant go to a pay station telephone and dial a number and then hang up the phone. Detective Barbara Hampton then observed that a "clone" of the digital pager utilized by SMITH was activated and displayed the telephone number of the same pay station where the lieutenant was now waiting for a call. Approximately two minutes later the lieutenant was observed to answer the pay telephone. Subsequent observations made by OCDETF agents during the evening hours of September 12, 1984, showed the lieutenant contacted SMITH through the use of SMITH's digital pager two additional times. Bagley told Detective Hampton that the lieutenant told him the lieutenant had ordered and received the heroin (Exhibit #1) from SMITH.

5. On September 20, 1984, the lieutenant delivered Exhibit #2, 4.96 grams of white powder, which was later analyzed as 32.8% heroin, to Bagley for $3200 in advanced official government funds while Bagley was under the controlled supervision of members of the OCDETF. Surveillance of this purchase by members of the OCDETF and the monitoring of the "clone" of SMITH's digital pager, revealed the lieutenant contacted SMITH on three occasions prior to the purchase of exhibit #2, and that Exhibit #2 was brought to the lieutenant by two unidentified Black male subjects who arrived in a 1974 Audi which was occupied by SMITH. Bagley told Detective Barbara Hampton that the lieutenant had telephoned SMITH to arrange for the delivery of Exhibit #2 to Bagley.

6. On October 5, 1984, SMITH and the lieutenant delivered to Bagley Exhibit #3, 5.43 grams of brown powder, later analyzed as 31.9% heroin, for $3,200 in advanced official government funds. Again Bagley was under the controlled supervision of OCDETF agents. Surveillance of the purchase of Exhibit #3 and monitoring of the "clone" of SMITH's digital pager by OCDETF agents revealed that the lieutenant utilized the pager on numerous occasions during the evening hours of October 4 and 5 to contact SMITH. SMITH subsequently delivered the heroin to the lieutenant, who delivered it to Bagley. Bagley saw SMITH bring the heroin to the lieutenant. Additionally the lieutenant told Bagley that he (the lieutenant) contacted SMITH through SMITH's pager, ordered the heroin from SMITH, and that SMITH brought the heroin to him (the lieutenant).

7. Another witness who would testify on behalf of the government if this case were to proceed to trial will be hereafter referred to as W-2. Within the past two years, W-2 was convicted of Felony narcotics charges for distribution of heroin. W-2 will testify that it was first introduced to JAMES E. SMITH in 1983 or 1984 and that the purpose of the introduction was to obtain narcotics from SMITH. W-2 began obtaining heroin from SMITH shortly after the introduction and continued doing so until 1985. W-2 will testify that during this period it purchased heroin from SMITH on as many as ten separate occasions. On each such occasion, W-2 purchased twenty to forty "spoons" of heroin from SMITH. W-2 will testify that it would pay SMITH $500 per spoon and was told by SMITH that the heroin would take a "ten or eleven cut", meaning the heroin could be substantially diluted before

it was packaged for street sale. W-2 will further testify it could make 35 to 40 quarters of heroin from one spoon of heroin provided by SMITH. W-2 will testify that SMITH made the heroin deliveries directly to W-2 and picked up the money directly from W-2, at a location in the District of Columbia.

8. Another government witness would be DeVoyce Gaye Caviness, who first began cooperating in this investigation after being contacted on October 19, 1987, by Detective Barbara Hampton and other agents of the DEA/MPD Narcotics Task Force (NTF). Ms. Caviness had been the subject of an NTF investigation during which she had made a number of heroin sales to an undercover police officer known to Caviness as "CC." During a debriefing, on October 19, 1987, following advice of her Constitutional rights, Caviness disclosed that all the heroin she sold she obtained from James E. SMITH, also known to her as "SMITTY."

9. Caviness will testify that she had become acquainted with SMITH in 1979 through an old boyfriend with whom she lived. Caviness' boyfriend was receiving regular and frequent visits from SMITH who entered their residence with paper bags which he gave to the boyfriend. Each time SMITH delivered a paper bag to the boyfriend SMITH received a quantity of money in exchange. On one occasion Caviness knocked over one of the paper bags on a shelf in the closet and inside the paper bag observed sandwich bags containing little bags of white powder. Caviness, believing the powder was cocaine, inquired of her boyfriend who told her the powder was heroin. On other occasions Caviness observed her boyfriend remove packages of powder from the paper

bags delivered by SMITH, packages which Caviness' boyfriend would sell for $25 each. Caviness stated that SMITH continued to make regular deliveries to her boyfriend until 1984.

10. Caviness will testify that in June, 1984, she left the apartment where her boyfriend was selling heroin and moved to 202 Elmira Street, S.W., Apartment 413, Washington, D.C., where she lived until recently with her three children. Due to her separation from her boyfriend and his subsequent arrest, Caviness needed money. Her cousin gave Caviness a telephone number for SMITH. Caviness called SMITH and he came to see her. SMITH told Caviness he had no money but said he could give her "a few shoes to work with." ("Shoes" is a code word used by narcotics traffickers to refer to heroin.) Shortly thereafter, SMITH gave Caviness twenty-five (25) "quarters" (a term for a package Containing an individual street dosage unit of heroin). SMITH told Caviness that she owed him $13.50 for each quarter. Caviness sold all the quarters to one individual for five hundred dollars ($500.00) from which she paid SMITH and kept the remainder. Thereafter Caviness continued to receive heroin from SMITH on a weekly basis. By June of 1987, Ms. Caviness was receiving one thousand quarters a month from SMITH. On several occasions she had helped SMITH package his heroin into quarters for sale on the streets

11. In March, 1987, an undercover DEA Agent began purchasing heroin from Caviness. Caviness and the undercover agent would testify to the following facts regarding these sales of heroin which was provided to Caviness by SMITH. On March 9, 1987, Caviness delivered a quantity of heroin to an undercover DEA agent

known to Caviness as "CC". Caviness received the heroin from SMITH earlier that day. After delivering the heroin to "CC", Caviness received one thousand dollars ($1,000.00) from "CC" of which she gave SMITH six hundred fifty dollars ($650.00) on March 11, 1987. The fifty (50) "quarters" received from Caviness were later analyzed as 16.897 grams of white powder which was 2.8% heroin.

12. On March 23, 1987, Caviness again delivered a quantity of heroin to "CC" in exchange for one thousand dollars ($1,000.00). SMITH had earlier brought this heroin to Caviness. Once again Caviness subsequently paid SMITH six hundred fifty dollars ($650.00) for the heroin she received from him. The fifty (50) "quarters" purchased by "CC" from Caviness were later analyzed as 12.01 grams of white powder which was 4.0% heroin.

13. On May 11, 1987, Caviness delivered a quantity of heroin to "CC" and was paid one thousand dollars ($1,000). SMITH had previously delivered this heroin to Caviness in a paper bag at the front of her apartment building. After being paid on delivery by "CC", Caviness paid SMITH six hundred fifty dollars ($650.00) for the heroin. The fifty (50) "quarters" purchased from Caviness were later analyzed as containing 7.96 grams of white powder which was 5.0% heroin.[4]

14. On June 1, 1987, Caviness delivered fifty (50) "quarters" of heroin to "CC" and was paid one thousand dollars ($1,000.00). Earlier that day SMITH had come to

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[4] There was an "extra" quarter which contained .211 grams of white powder which was 5.0% heroin.

her residence to deliver the heroin. Caviness saw SMITH drive into the block and leave. SMITH later called Caviness with instructions to come to meet him. When she met him,SMITH gave Caviness the heroin and explained that something did not "look right" as he drove through her block so he changed the site of the delivery. Caviness was paid on delivery by "CC" and subsequently, paid SMITH six hundred fifty dollars ($650.00). The fifty (50) "quarters" were later analyzed as 6.036 grams of white powder which was 5.7% heroin.

15. On September 25, 1987, Caviness delivered forty-six (46) "quarters" of heroin to "CC". She charged him fifteen dollars ($15.00) a "quarter" instead of her normal charge of twenty dollars ($20.00) per "quarter." She had discovered the heroin in a bag in her closet while cleaning the closet. It was part of an earlier delivery from SMITH which had been misplaced. She kept the entire six hundred ninety dollars ($690.00) that "CC" paid her. The forty-six (46) quarters contained 5.322 grams of white powder which was 5.9% heroin and .862 grams which was 2.7% heroin according to the laboratory report.

16. Early in October, 1987, "CC" telephoned Caviness and ordered one thousand (1,000) "quarters" of heroin. Using her telephone Caviness relayed this order to SMITH and on October 7, 1987 SMITH delivered two hundred fifty (250) "quarters" to Caviness at the front door of her apartment building. SMITH explained that this was all he had on hand and that Caviness should give it to "CC" and see how "CC" liked it. On October 8, 1987, Caviness delivered the two hundred fifty (250) "quarters" to "CC" and again charged him fifteen dollars ($15.00) per "quarter." "CC" paid her three thousand

eight hundred fifty dollars ($3,850.00) and Caviness subsequently paid SMITH three thousand dollars ($3,000.00). The two hundred fifty quarters were later analyzed as 78.22 grams of white powder which was approximately 6.0% heroin.

17. On October 30, 1987, DeVoyce Gaye Caviness, after being approached by law enforcement authorities and with the advice of her attorney, entered into a plea agreement with the United States. That agreement required that Caviness plead guilty to three felony counts and cooperate fully with federal law enforcement authorities in investigating the narcotics conspiracy in which she was involved. This cooperation includes testimony before the Grand Jury and at trial. Ms. Caviness also consented to the monitoring of all incoming and outgoing telephone calls on the telephone number (202) 562-2778 at 202 Elmira Street, S.W., Apartment 413, Washington, D.C., subscribed to by her in her maiden name of Gaye Hancock. Thereafter, Caviness made additional purchases of heroin from SMITH while under the supervision of DEA agents. Caviness also introduced to SMITH Special Agent Veronica Baker who also made heroin purchases from SMITH. Caviness and Special Agent Baker would testify to the following facts regarding these heroin purchases from SMITH.

18. On November 6, 1987, Caviness telephoned SMITH and ordered two hundred and fifty (250) quarters of heroin. During a tape recorded conversation, SMITH told Caviness "that's no problem".[5] On November 8,

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[5] In this telephone conversation between Caviness and SMITH regarding the purchase of heroin, as well as other such

1987, during the late evening hours SMITH came to the Caviness' residence and picked her up. SMITH drove Caviness to one of his (SMITH's) residences located at 12216 Parkton Street, Fort Washington, Maryland. During the early morning hours of November 9, 1987, while inside the Parkton Street residence, SMITH delivered Exhibit #12, approximately eight hundred and fifty (850) quarters of white and brown powder to Caviness. SMITH told Caviness she owed him $13.50 for each quarter. Caviness would testify that at about 8:00 a.m. (11-09-87) SMITH drove her, along with the 850 quarters of heroin, back to her residence in Southwest Washington, D.C. Special Agent Veronica Baker, subsequently assumed possession of Exhibit #12. Subsequent laboratory analysis disclosed that Exhibit #12 was 179.42 grams of white and brown powder which was approximately 7.0% heroin. At a later date, Caviness paid SMITH $11,475 in advanced official government funds for Exhibit #12.

19. On November 20, 1987, SMITH came to Caviness residence in Washington, D.C., and delivered Exhibits #13, #14, and #15. Exhibit #13 consists of 2.53 grams of white powder analyzed as 3.6% heroin. Exhibit #14 consists of 2.62 grams of white powder analyzed as 3.6% heroin. Exhibit #15 consists of 3.06 grams of white powder which the laboratory found to be 81% cocaine. SMITH delivered the exhibits to Caviness in the presence of Special Agent Baker who was serving in an undercover

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conversations described below, SMITH uses code-words to refer to heroin. SMITH's use of code-words to refer to heroin has been explained by Caviness, which explanation is corroborated by SMITH's subsequent deliveries of heroin as described, *infra*.

capacity. SMITH did not charge Caviness for Exhibit #13, #14, and #15, but requested that she get the packages tested for him.

20. On November 26, 1987, SMITH delivered Exhibit #16 to Caviness while in the Southwest area of Washington, D.C. Exhibit #16 consists of 3.147 grams of white powder analyzed as 6.5% heroin. A DEA agent assumed possession of Exhibit #16 from Caviness. During conversation with Caviness, SMITH again requested that Caviness get the heroin tested for him and did not charge Caviness for the sample of heroin.

21. On December 3, 1987, the Honorable Louis F. Oberdorfer signed an order authorizing the interception of wire communications over Ms. Caviness' telephone at 202 Elmira Street, S.W., apartment 413, Washington, D.C. On January 2, 1988 interceptions were terminated upon the expiration of authorization. Authorization was renewed by Judge Oberdorfer on January 13, 1988 and interception continued until SMITH's arrest on February 6, 1988.

22. On December 4, 1987. Caviness again called SMITH and ordered two hundred and fifty (250) quarters of heroin from SMITH. This telephone conversation was recorded. On this same date, while at Caviness's residence, SMITH delivered to Caviness Exhibit #17, which consists of 81.55 grams of white powder analyzed as 5.4% heroin. Special Agent Baker, who witnessed the delivery while serving in an undercover capacity, subsequently assumed possession of Exhibit #17. On December 11, 1987, SMITH came to Caviness' residence where Caviness paid SMITH $4,050 in advanced official government

funds for Exhibit #17. A surveillance conducted by Task Force members, during the receipt of the $4,050 by SMITH at Caviness' residence, revealed that SMITH was operating a 1988 Chevrolet Pick-up Truck, displaying Maryland registration 428-327. Task Force members observed SMITH leave Caviness' residence, enter the 1988 Chevrolet truck and leave the area. The Maryland Department of Motor Vehicles records show that tag number 428-327 is registered to James Edwood SMITH at 12216 Parkton Street, Fort Washington, Maryland. The 1988 Chevrolet truck has vehicle identification number (VIN) #1GCFK24K4JZ111370.

23. On December 13, 1987, SMITH telephoned Caviness. Caviness told SMITH her customer was ready for two hundred and fifty (250) more quarters and would be wanting 250 every week. SMITH told her that that would be no problem. This conversation was recorded. On December 16, 1987, SMITH delivered to Caviness Exhibit #18, which consists of 68.83 grams of white powder analyzed as 6.6% heroin, and 4.01 grams of brown powder analyzed as 2.5% heroin. An investigator from the Task Force assumed possession of Exhibit #18 from Caviness. On December 23, 1987, SMITH came to Caviness' apartment to receive payment for Exhibit #18. Inside the apartment, Special Agent Baker while serving in an undercover capacity paid SMITH $3,955 in advanced official government funds for Exhibit #18.

24. On December 28, 1987, Caviness ordered a "spoon" of heroin from SMITH. On December 29, 1987, SMITH delivered Exhibit #19, a quantity of white and tan powder along with some cutting (diluting) materials to Caviness while in Southwest Washington, D.C. Special

Agent Baker assumed possession of Exhibit #19 from Caviness, and later turned Exhibit #19 over to affiant Detective Hampton. Exhibit #19 was analyzed as 3.56 grams of white and tan powder which was 54% heroin. Caviness paid SMITH $550 for Exhibit #19.

25. On January 2, 1988, SMITH again telephoned Caviness. During the conversation Caviness ordered more heroin from SMITH. On January 4, 1988, SMITH delivered Exhibit #20, approximately 55 grams of white powder to Caviness. Special Agent Baker assumed possession of Exhibit #20 from Caviness. Laboratory analysis disclosed that Exhibit #20 was 52.46 grams of white powder which was 8.1% heroin. SMITH did not charge Caviness for the sample of heroin.

26. On January 20, 1988, SMITH telephoned Caviness. During the recorded conversation Caviness ordered more heroin from SMITH; however, on this occasion Caviness asked SMITH if "RONNIE" (Special Agent Veronica Baker) could meet SMITH and pick up the package. SMITH agreed. On January 21, 1988, SMITH delivered Exhibit #22, which consists of 75.75 grams of white powder analyzed by the laboratory as 4.1% heroin, to Special Agent Baker while in the southwest area of Washington, D.C. SMITH delivered the heroin to Special Agent Baker while seated in a late model red Chevrolet Camaro which displayed District of Columbia dealer registration D-01279. This dealer registration is listed to Champagne Productions, Inc., at 1939 17th Street, N.W. On January 27, 1988, S/A Baker paid SMITH $4,360 in advanced official government funds for Exhibit #22 while in the vicinity of Caviness' apartment in southwest Washington, D.C. A surveillance conducted by Task Force investigators at

Caviness' residence during the receipt of the $4,360, revealed that SMITH was operating a Chevrolet Blazer which displayed Virginia registration PLR-974. Virginia Department of Motor Vehicle records show that registration PLR-974 is currently listed in James E. Smith at 12216 Parkton Street Fort Washington, Maryland. This Chevrolet Blazer has VIN #1G8CT18B6E0174334.

27. On January 27, 1988, Special Agent Baker, while serving in an undercover capacity ordered 250 more quarters of heroin from SMITH. SMITH agreed and on February 1, 1988, SMITH delivered Exhibit #23, approximately 89.4 grams of white powder to Special Agent Baker while inside Caviness' residence in southwest Washington, D.C. Exhibit #24 was subsequently analyzed as 86.6 grams of white powder which was 4.5% heroin. Special Agent Baker owed SMITH $4995 for Exhibit #23. A surveillance conducted by the Task Force members at Caviness' residence during the receipt of Exhibit #23 from SMITH revealed that SMITH was operating a 1987 Chevrolet Pick-Up Truck which displayed Virginia registration MRT-103. Information provided by the Virginia DMV shows that on November 18, 1987, James E. SMITH of 12216 Parkton Street, Fort Washington, Maryland, obtained a new registration for the same 1987 Chevrolet Truck with the same VIN number. The new Virginia registration is tag number PLR-975.

28. On February 6, 1988, at 12:30 p.m. Smith telephoned Caviness at her residence and told her that he had to go get his "suit" (a code term for heroin). Smith also asked how much money "Ronnie" (S/A Baker) had for him and Caviness told him "Ronnie" had $7,000.00. SMITH stated that he would call again when he was in

the area. At 2:28 p.m. SMITH called again and told Caviness he would be there in "two minutes". These conversations were recorded. At 2:48 p.m. SMITH was arrested when he entered Caviness' apartment. Seized from SMITH's person was Exhibit #24 consisting of 158.05 grams of white powder which was analyzed as 7.3% heroin.

Counts Two through Four – Attempt to Evade Income Taxes For Years 1984, 1985 and 1986)

29. The government's evidence at trial would show that defendant willfully attempted to evade or defeat Federal income tax due and owing in substantial amounts in each of the tax years 1984, 1985 and 1986. The income tax due and owing in each tax year has been determined on the basis of the government's evidence to be as follows:

| Tax Year | Taxable Income | Tax Due |
|---|---|---|
| 1984 | $101,084.74 | $ 36,170.65 |
| 1985 | $ 93,020.10 | $ 31,797.35 |
| 1986 | $411,392.11 | $147,256.06 |

Yet the evidence will show that defendant failed to file a Federal income tax return in each of the three tax years at issue.

30. The evidence would show that during the tax years 1984, 1985 and 1986, defendant received substantial income from the distribution of heroin in the District of Columbia. Specifically, and as set forth in greater detail *supra*. (¶¶ 1-28), government witnesses would testify that defendant sold heroin to various individuals in quantities ranging from a kilogram down to pre-packaged street

doses (commonly referred to as quarters). The government's witnesses would also testify that defendant sold quantities of cocaine to various individuals during the years 1985 and 1986. In addition, following his arrest and after being advised of his constitutional rights, SMITH admitted that he had sold substantial quantities of heroin to DeVoyce Gaye Caviness throughout the period 1984-1986, and that he had sold kilo quantities of cocaine in 1985 and 1986.

31. The government's financial evidence would detail the personal expenditures of defendant, as well as the increases in defendant's net worth, during the tax years 1984, 1985 and 1986. Documents and testimony would be offered by the government to evidence the following:

| Tax Year | Increase in New Worth | Personal Expenditures | Increase in Net Worth Plus Personal Expenditures[6] |
|---|---|---|---|
| 1984 | $32,330.96 | $159,849.55 | $192,180.51 |
| 1985 | $35,990.02 | $105,251.26 | $141,241.28 |
| 1986 | $50,855.48 | $420,836.36 | $471,691.83 |

The government's evidence of the increase in defendant's net worth in each tax year would include records of (1) cash deposits by defendant in numerous bank

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[6] In the government's proof of the tax owed by defendant on these amounts, testimony would be provided by an IRS Revenue Agent as to all adjustments, deductions and exemptions allowed. Such calculations would reduce defendant's taxable income to the amounts set forth at paragraph 29, *supra*.

accounts; and (2) payments to acquire numerous residential properties. Such evidence would show that defendant purchased seven residential properties during the period 1980-1987, and that defendant made substantial payments on six of these properties during the tax years 1984, 1985 and 1986. The government's evidence of defendant's personal expenditures in each tax year would include records and testimony reflecting (1) expenditures for the purchase of more than twenty-five automobiles during the period 1984 through 1986; (2) expenditures to insure and maintain defendant's numerous residential properties, two apartments and his fleet of automobiles; (3) expenditures to acquire numerous pieces of gold jewelry; and (4) expenditures for the support of various adult family members and associates.

32. The government's evidence would show, in addition to defendant's failure to file an income tax return in 1984, 1985 and 1986, various affirmative acts of evasion. For example, records and testimony would demonstrate that defendant conducted his financial affairs almost exclusively in cash. Deposits into defendant's bank accounts were made, almost without exception, in cash. Although defendant maintained several checking accounts in his name, payments which defendant made on even major expenditures, such as down payments on real estate and expensive automobiles, were made by defendant with money orders, cashiers checks, or in cash. The government's evidence would also demonstrate that defendant purchased numerous assets, including approximately nineteen (19) automobiles during the period 1984-1986, in the names of "straw purchasers." Moreover, testimony from the government's witnesses would reveal

statements by defendant reflecting his efforts to evade the accurate assessment and calculation of his tax liability, after learning that he was the subject of a criminal tax investigation. Such testimony would outline defendant's plans to conceal his assets by acquiring many of the assets in the names of "straw purchasers," and to convert his narcotic distribution proceeds into other assets, such as jewelry, which is easily secreted and difficult to trace. Moreover, as further proof of defendant's willful evasion of taxes, as well as defendant's knowledge that he was violating a known legal duty, the government would offer, subject to an appropriate cautionary instruction, evidence of defendant's taxpayer history, including his 1973 conviction for evasion of Federal income taxes. *See, e.g., United States v. Magnus*, 365 F.2d 1007, 1011 92nd Cir. 1966); *Matthews v. United States*, 407 F.2d 1371, 1381; *See also* Fed. R. Evid. 404(b).

Count Five – Forfeiture

33. Title 21 United States Code, Section 853(d) provides:

> (d) There is a *rebuttable presumption* at trial that any property of a person convicted of a felony under this subchapter or subchapter II of this chapter is subject to forfeiture under this section if the United States establishes by a preponderance of the evidence that –
>
> (1) such property was acquired by such person during the period of the violation of this subchapter or subchapter II of this chapter or within a reasonable time after such period; and

(2) there was no likely source for such property other than the violation of this subchapter or subchapter II of this chapter. (Emphasis supplied).

The evidence of defendant's participation in a Conspiracy to Distribute and Possess with Intent to Distribute Heroin during the period 1979 to October 19, 1987, proffered in paragraphs 1-28, *supra*, provides a factual basis for acceptance of defendant's plea of guilty to Count One of the Information. Should the Court accept defendant's plea to Count One, the government need only proffer with respect to Count Five evidence establishing probable cause that (1) the real and personal property described in Count Five was acquired during the period 1979 through October 19, 1987, or within a reasonable time thereafter; and (2) that there was no likely source of income, other than narcotic distribution proceeds, with which defendant could have acquired said property.

34. To establish, by a preponderance of the evidence, that defendant acquired the property described in Count Five during the period of the narcotics violation, or within a reasonable time thereafter, the government would offer property deeds, automobile registrations, bank deposit records and purchase invoices or receipts evidencing the acquisition of the charged real and personal property during the period 1979-1987. Furthermore, the government would offer defendant's post-arrest admissions that he converted a substantial portion of his narcotics distribution proceeds into the gold jewelry which was seized by agents from defendant's Parkton Street residence on February 6, 1988, and that he used other narcotics proceeds to acquire the automobiles

which were also seized at various of defendant's residences following his arrest. The government's evidence would also include defendant's post-arrest admissions that the cash recovered from various of his residences, as well as the monies contained in defendant's bank accounts, constituted narcotics proceeds.

35. The government's evidence would also establish, through the testimony of witnesses acquainted with defendant, that he had no source of income during the period 1979 to present, other than narcotics distribution activities, with which he could have acquired the real and personal property described in Count Five. To corroborate this testimony, the government would offer evidence that although SMITH has from time to time, prior to his arrest, claimed to be employed in certain legitimate businesses, these businesses were mere "fronts", and did not provide SMITH with a salary or income. Specifically, testimony from former employees of the two companies with which SMITH claimed employment during the period 1979 to 1986, Professional Limousine Service and Tenth Street Auto Body, would demonstrate that the companies never produced income sufficient to meet basic operating expenses. In addition, the government would offer a detailed financial analysis of the records of Professional Limousine Service produced in response to grand jury subpoena by defendant's daughter, the manager of that company. This analysis would show that the basic operating expenses of Professional Limousine Service –

expenses for office rent, automobile insurance and automobile parking alone – far exceeded any income which the company realized.[7]

Respectfully submitted,

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United States Attorney

/s/ Charles S. Leeper
CHARLES S. LEEPER
Assistant United States Attorney

/s/ William J. O'Malley/CSL
WILLIAM J. O'MALLEY, JR.
Assistant United States Attorney

/s/ Darryl W. Jackson/CSL
DARRYL W. JACKSON
Assistant United States Attorney

CERTIFICATE OF SERVICE

A copy of the foregoing Government's Proffer of Evidence has been delivered by hand, to counsel for defendant, Brian P. Gettings, Suite 500, 1400 N. Uhle

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[7] The government's testimony and documentary evidence demonstrating that SMITH had no likely source of income during the period 1979 to present, other than narcotics proceeds, with which he could have acquired the property described in Count Five, is detailed in the 46 page Affidavit in Support of Seizure Warrant, a copy of which is contained in the Court record. On the basis of this Affidavit, Magistrate Jean F. Dwyer, on February 4, 1988, issued a Seizure Warrant for Smith's real and personal property which was executed by Federal Agents and Deputy U.S. Marshals within hours of SMITH's arrest.

Street, Arlington, Virginia, 22201 this 15th day of March, 1988.

/s/ William J. O'Malley/CSL
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